92-1776

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.:_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MOSSIE JOHNSON, Petitioner

v.

DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and
ROSE'S STORES, INC., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

DAVID E. WAITE
LAW OFFICES OF
JAMES L. MILLIGAN
AND ASSOCIATES
One Centre Square
Suite 301
620 Market Street
Knoxville, TN 37902
(615) 524-3013
Counsel of Record

APRIL 30, 1993

QUESTION PRESENTED

1. Can a State Court Clerk's failure to preform a ministerial duty amount to a deprivation of an individual's rights under the Fourteenth Amendment's guarantees of due process and equal protection of the law?

LIST OF PARTIES

The parties in the proceedings below were the petitioner, Mossie Johnson and the respondents David Lynch, D\B\A\ Forrest Hills Shopping Center, and Rose's Stores Inc., C.T. Corporation System.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

MOSSIE JOHNSON, Petitioner,
v.
DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and ROSES STORES, INC., Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF KENTUCKY

The petitioner, Mossie Johnson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Commonwealth of Kentucky, entered in the above entitled proceeding, July 31, 1992, and finalized by a denial of discretionary review, February 10, 1993.

OPINIONS BELOW

The Order of the Whitley County, Kentucky Circuit Court dismissing the petitioner's cause was not published, but a copy is

attached in the appendix hereto, p. 1a infra.

The Opinion of the Court of Appeals of Kentucky affirming the lower Court, was not available for publication, but a reprint is attached in the appendix hereto, p. 4a, infra.

The subsequent Denial of Discretionary Review of petitioner's cause by the Supreme Court of Kentucky was likewise unpublished, and the reprint of that order is attached in the appendix hereto, p. 11a, infra.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Kentucky Court of Appeals is invoked under 28 U.S.C. § 1257. This cause became a final judgment of the Commonwealth of Kentucky when the Kentucky Supreme Court denied discretionary review of the Federal issue, which was raised during the Civil Appeal Prehearing statement, as required by Kentucky law.

STATUTES INVOLVED

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title right or privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

UNITED STATES CONSTITUTION, Amendment Fourteen (14).

Section One (1). Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, Mossie Johnson, was seriously injured when she fell over a concrete abutment on the premises of respondent's business. Petitioner obtained counsel, who proceeded to file suit in the Commonwealth of Kentucky, in the County where the accident occurred. Kentucky has a one year statute of limitations applicable to personal injury claims. Petitioner's claim was filed three days before the limitation period expired. In Kentucky, however, the limitation period is not satisfied until the Clerk of the Court where suit has been filed issues a summons. The Clerk did not issue a summons in petitioner's cause until four days after the complaint was filed, which resulted in the dismissal of petitioner's claim as time barred.

The time in which Kentucky chooses to satisfy its limitation

of actions period is not at issue. The procedure may have its flaws, but the issue requiring this Court's attention relates to the due process deprivation caused by the Clerk who failed to administer her duty. Petitioner was deprived of a recognized property right when the clerk delayed the issuance of the summons, and prevented petitioner from prosecuting her claim.

The Federal constitutional issue was first raised by the petitioner at the initial appellate level. In petitioner's Civil Prehearing Statement filed with the Kentucky Court of Appeals, the petitioner first claimed that the dismissal of her action violated her rights to due process and equal protection under the Fourteenth Amendment. A copy of this Prehearing Statement is attached in the appendix hereto at p. 12a, infra.

REASONS FOR GRANTING THE WRIT

I.

The judgment of the Kentucky Court of Appeals violates petitioner's rights under the due process

clause of the Fourteenth Amendment.

The Kentucky Constitution affirms the common law right of access to the courts in cases of personal injury. Ky. Const. § 14. It is well recognized in Federal Law that such a state created right is a property right protected under the 5th and 14th Amendments to the U.S. Constitution. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 320; 70 S. Ct. 652, 660 (1950); Logan v. Zimmerman Brush Co., 455 U.S. 422, 428; 102 S. Ct. 1148, 1154 (1982). This Court has held that an individual entitlement, grounded in state law, cannot be removed except for cause and with the protection of "due process". Logan, 102 S. Ct. at 1155. Thus, the issue to be resolved in petitioner's cause is whether by arbitrarily denying her claim, the Clerk of the Whitley County Kentucky Circuit Court deprived her of her rights of due process.

The procedure to initiate a civil law suit in Kentucky is recognized as one that both allows the injured party sufficient time to make a complaint and protects those accused of tortious conduct from stale claims. However, the system can break down, and, as in petitioner's cause, a meritorious claim can be dismissed due to events

be yond the control of the parties. Petitioner's cause was dismissed due to the failure of a Court Clerk to act, which resulted in a due process deprivation.

The petitioner does not complain that the procedure of initiating suit in Kentucky is invalid. The contention is that in her specific situation, the procedure has randomly deprived her of a recognized property right without due process of law.

In Logan, the Court began its opinion by stating: "The issue in this case is whether a State may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure. . .," supra, 102 S. Ct. at 1151. The Court held that the state system had destroyed the complainant's property interest, thereby denying him due process. Id. at 1158.

In this case, the petitioner's cause of action was terminated because the Court Clerk failed to comply with the procedures mandated by Ky. Rev. Stat. § 413.250 and Ky. R. Civ. P. Rule 3. In both Logan and in this case, the inaction which caused the deprivation was a state agent's failure to perform a ministerial duty

according to State procedure. In both cases it was the implementation and application of a subsequent state procedure that deprived the parties of their rights to a hearing on the merits of their cause of action. In Logan, this Court decided that the state system destroyed the complainant's property interest in a right of action. As the facts and results are parallel, the outcome, under the reasoning of Logan should be the same: a hearing on the merits of the case.

The Kentucky Court of Appeals found the petitioner's action distinct from the holding in Logan. They opined that in petitioner's case, counsel for the complainant is charged with knowing that a summons must be issued in order to validly commence an action. True, counsel may be charged with knowing the limitations of actions requirements, but nowhere in the law of Kentucky is an attorney given the power or authority to compel the issuance of a summons. Like the claimant in Logan, once the petitioner filed her claim, she was at the mercy of a state official. When this state official failed to administer her duty, the result was a deprivation of the petitioner's rights under the Due Process Clause of the Fourteenth Amendment.

Therefore, the Kentucky Court of Appeals was incorrect in

stating that the issues presented by petitioners actions were distinguishable from those in decided in Logan. In furtherance of its mistaken opinion, that Court relied on language in Logan which declared that a state may enact reasonable procedural requirements for triggering the right to adjudication; i.e., statutes of limitations, and such requirements would not result in due process deprivations. Petitioner agrees with this principle. However, when a state official charged with carrying out these reasonable procedures fails to do so, and the failure results in the loss of a property right, a due process violation occurs.

II.

The judgment of the Kentucky Court of Appeals violates the petitioner's rights under Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause means, at the very least, that legislation must classify the persons it affects in a manner rationally related to legitimate governmental objectives. Logan 102 S. Ct. at 1159. Neither Ky. Rev. Stat. § 413.250 nor Ky. R. Civ. P. Rule 3,

as applied to petitioner's case, meet this minimum definition.

Certainly, the Commonwealth has a legitimate governmental interest in requiring the timely disposition of personal injury claims, and it achieves that result in a rational manner through its limitation period, embodied in Ky. Rev. Stat. § 413.140. But, § 413.140 and Ky. R. Civ. P. Rule 3, acting together, and, as applied here, effectively bar an action if a state actor, the Court Clerk, fails to fulfill her duty. Justice Powell could have been talking about petitioner's cause when he wrote,

> The decision of the Illinois Supreme Court effectively created two classes of claimant: those whose claims were, and those whose claims were not, processed within the prescribed 120 days by the Illinois Fair Employment Practices Commission . . . The state no doubt has an interest in the timely disposition of claims. But the challenged classification failed to promote that end - or indeed any other - in a rational way. As claimants possessed no power to convene hearings, it is unfair and irrational to punish them for the Commission's failure to do so . . . this Court has held repeatedly that state-created classifications must bear a rational relationship to governmental objectives . . [T]he challenged statute, as construed and applied in this case, failed to comport with this minimal standard. Logan, 102 S Ct. at 1162, (Powell, J. concurring).

Since the petitioner possesses no power to issue process and no

power to compel the clerk to issue process, it is unfair and irrational to punish her for the Court Clerk's negligent behavior.

When the applicable state provisions are construed and applied against the petitioner as they were in her cause against respondent, the random and arbitrary actions of the Clerk put her cause in the "have not" classification. This random classification by the Clerk has no legitimate governmental purpose, and has denied petitioner equal protection of the laws.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The Kentucky Court of Appeals has rendered a judgment which is in direct conflict with prior valid decisional law of this Court. Petitioner requests this petition be granted, and this Court grant relief as appropriate.

Respectfully Submitted,

DAVID E. WAITE
LAW OFFICES OF
JAMES L. MILLIGAN
AND ASSOCIATES
One Centre Square
Suite 301
620 Market Street
Knoxville, TN 37902
(615) 524-3013

Counsel of Record

APRIL 30, 1993

APPENDIX

COMMONWEALTH OF KENTUCKY
WHITLEY CIRCUIT COURT
CIVIL ACTION NO. 90-CI-510

MOSSIE JOHNSON

Plaintiff,

vs.

DENNIS LYNCH d/b/a
FOREST HILLS SHOPPING CENTER
and ROSE'S STORE, INC.

Defendants.

ORDER

Upon motion of the Defendant Roses Stores, Inc. to dismiss and upon motion of Defendant Dennis Lynch, d/b/a Forest Hills Shopping Center for Summary Judgement, and the Court having heard counsel, considered the record and being in all respects sufficiently advised;

IT IS HEREBY ORDERED that the Complaint of the Plaintiff herein be and is dismissed on the grounds that the Complaint was not

timely filed within the applicable statute of limitations set forth in KRS 413.140 and KRS 413.250.

This case shall now be stricken from this Courts docket with prejudice.

This the 11th day of March, 1991.

_____

JUDGE, WHITLEY CIRCUIT COURT

Distribution:

Hon. John Hackley
Farmer, Keller & Keller
502 W. Fifth Street
P.O. Drawer 490
London, KY 40743-0490

Hon. David E. Waite
Milligan Law Firm
Suite 301
620 Market Street
Knoxville, TN 37902-2286

Hon. Fred White
Weatherly & Sholar
P.O. Box 1094
London, KY 40741

GWB 3-13-91
CLERK'S INITIALS DATE

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34/39

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 91-CA-681-MR

MOSSIE JOHNSON

Appellant,

vs.

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER; and ROSE'S STORES, INC.

Appellee.

AFFIRMING

BEFORE: GUDGEL, HOWERTON, and WILHOIT, Judges.

GUDGEL, JUDGE: This is an appeal from an order entered by the Whitley Circuit Court dismissing appellant's action because it was not timely filed. Appellant contends that the court's order of dismissal violated her rights under the Kentucky Constitution and the United States constitution. We decline to review appellant's first contention regarding the Kentucky Constitution because this issue was not raised in her prehearing statement. CR 76.03(6);[1] Howard

v. Magoffin County, Ky. App., 734 S.W. 2d 499 (1987); Karam v. Greentree Corp., Ky. App., 783 S.W.2d 78 (1990). We disagree with appellant's second contention. Hence, we affirm.

Appellant Mossie Johnson was injured on September 13, 1989, when she fell on a concrete barrier at appellee Rose's Store in Corbin, Kentucky. On September 10, 1990, she filed a tort action against Rose's and against appellee David Lynch, d/b/a Forest Hills Shopping Center. However, summonses on the complaint were not issued by the clerk until September 14, 1990, appellees filed motions to dismiss arguing that the action was not timely filed because the first summons issued on the complaint was not issued before the applicable limitations period expired. The court granted the motions. This appeal followed.

Civil Rule 3 provides that a civil action is commenced by the filing of a complaint and the issuance of a summons. KRS 413.250 provides that an action shall be deemed to commence on date of the first summons. Pursuant to CR 3 and KRS 413.250, therefore, appellant's action must be deemed to have been commenced on September 14, 1990, the date on which the first summons was

issued. This was one day after the one-year statute of limitations, provided for in KRS 413.140, for filing a personal injury action had run. It is well established that failure to have a summons issued within the statutory limitations period is fatal to a cause of action. Casey v. Newport Rolling Mills Co., 156 Ky. 623, 161 S.W. 528 (1913); Simpson v. Antrobus, 260 Ky. 641, 86 S.W.2d 544 (1935); Delong v. Delong, Ky., 335 S.W.2d 895 (1960).

Appellant seeks to avoid this rule, however, arguing that the failure to issue the summons in the instant action was due to the clerk's failure to issue it "forthwith," or immediately, upon the filing of appellant's complaint as clerks are directed to do by CR 4.01 and KRS 30A.140. Appellant does not argue that the procedure for initiating a civil law suit in Kentucky is constitutionally invalid. Instead, she maintains that dismissing her cause of action because of the clerk's failure to immediately issue a summons, which appellant argues was beyond her power to do or to compel the clerk to do, resulted in her federal rights to due process and equal protection of the laws being violated. We disagree.

Appellant relies on the Supreme Court's decision in Logan v.

Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) to support her argument. The issue in Logan was whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily-mandated procedure. Although the appellant in Logan timely filed his charge with the Illinois Fair Employment Practices Commission, the Commission failed to conduct a conference within the statutorily-mandated time. The Commission denied appellee's motion to dismiss the charge because the conference was not held within the statutory period. However, on appeal, the Illinois Supreme Court held that the Commission's failure to timely conduct a conference deprived the Commission of jurisdiction to hear the charge. The U.S. Supreme Court reversed, holding that appellant was deprived of a protected property interest in violation of the due process clause of the Fourteenth Amendment because the state's interest in refusing his procedural request was outweighed by his private interest and the length or finality of the deprivation.

Justice Blackman, in a separate opinion, joined by Justices

Brennan, Marshall and O'Connor, concluded that the Illinois statute also violated Logan's right to equal protection of the laws because the statute, as interpreted and applied by the Illinois Supreme Court, created tow categories of claims without a rational basis for doing so.

The instant action, however, is distinguishable from Logan. Here, appellant's counsel is charged with knowing that a summons must be issued in order to validly commence an action. Although the summons must be issued by the clerk, there was no evidence adduced at the hearing on the motion to dismiss showing that appellant's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that appellant's counsel checked with the clerk to make sure that a summons had been issued. As the Supreme Court stated in Logan, the state may enact reasonable procedural requirements for triggering the right to an adjudication; i.e., statutes of limitations or, in appropriate cases, filing fees without violating the due process rights of claimants. Therefore, whether the actions of the Whitley Circuit Clerk were intentional or negligent, they did not violate appellant's due process and equal protection rights under the federal constitution.

However, as appellee points out, appellant is not without a remedy for the clerk's action, or inaction in this situation. Section 103 of the Kentucky Constitution requires that clerks give such bond as prescribed by law. KRS 30A.030 requires that all clerks shall be bonded for the faithful performance of their duties. In the case of Commonwealth, to Use of Green v. Johnson, 123 Ky. 437, 96 S.W. 801, 802 (1906), our highest court held that clerks are liable for errors committed in their ministerial functions unless they can show that the errors occurred in spite of the use of reasonable care and diligence. Moreover, a clerk is liable in damages for the negligent and careless act of his deputy. Id. See also Jeffers v. Taylor, 178 Ky. 392, 198 S.W. 1160 (1917).

The court's order is affirmed.
ALL CONCUR.

ATTORNEY FOR APPELLANT:

David E. Waite
Knoxville, TN

ATTORNEY FOR DENNIS LYNCH, d/b/a
FORREST HILLS SHOPPING CENTER:
Fred F. White
London, KY

ATTORNEYS FOR ROSE'S STORES, INC.
F. Preston Farmer
John Warren Keller
John E. Hackley
Martha L. Brown
London, KY

SUPREME COURT OF KENTUCKY
92-SC-690-D

MOSSIE JOHNSON

Movant,

vs. 91-CA-681-MR
WHITLEY CIRCUIT COURT
90-CI-510

DENNIS LYNCH, d/b/a
FOREST HILLS SHOPPING CENTER
and ROSE'S STORE, INC.

Respondents.

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED: February 10, 1993.

Robert F. Stephens
Chief Justice

COURT OF APPEALS OF KENTUCKY

CIVIL APPEAL PREHEARING STATEMENT
(CR 76.14)

Mossie Johnson

Appellant,

v. Court of Appeals Docket
No. 91 CA 681

Dennis Lynch d/b/a Forrest Hills Shopping Center and Rose's Stores, Inc.

Appellee.

APPEAL FROM Whitley CIRCUIT COURT-ACTION NO. 90-CI-510
TRIAL JUDGE: Jerry Winchester
DATE JUDGEMENT/ORDER APPEALED FROM ENTERED March 13, 1991
DATE NOTICE OF APPEAL FILED March 25, 1991 NOTICE OF CROSS APPEAL COUNSEL Mossie Johnson (APPEALANT)

(x) Plaintiff () Defendant () Other
Appellant Counsel:
Name David E. Waite
Address 620 Market Street, Suite 301
City/State Knoxville, TN 37902-2286
Telephone (615) 524-3013

COUNSEL FOR Rose's Stores, Inc. (APPELLEE)
() Plaintiff (x) Defendant () Other
Appellee Counsel:
Name John Hackley
Address P.O. Drawer 490
City/State London, KY 40743-0490

Telephone (606) 878-7640

1. Has this case been before an Appellate Court previously No
If so when and identify_____
2. **Type of litigation** (e.g., automobile negligence, breach of contract, domestic, product liability, property dispute, tax, UCC, zoning, etc.)
** **Attach a copy of the complaint** ** Premises liability

3. **Circuit Court Disposition** (type of order; e.g., Default or Summary Judgment, Dismissal, etc.) **(Attach a copy of any written opinion by trial court.)** Order of Dismissal

4. **Relief:**
(a) Damages: Unspecified
Amount Sought $_____
Amount Granted $_____
(b) Injunction: ()Granted ()Denied
(c) Other: 10a

5. **Facts and issues:** (Brief statement of tacts, claims, defenses and issues litigated) (Attach a separate sheet if necessary.) The plaintiff was injured on September 13, 1989. The clerk issued the summons on September 14, 1990. The trial court, pursuant to defendants' motions dismissed the complaint as barred by the applicable statute of limitations set forth in KRS 413.140 and KRS 413.250.

6. Briefly state issues proposed to be raised on appeal (including jurisdictional challenges) and any question of first impression. (Attach a separate sheet if necessary.) Whether dismissal of the action violated the plaintiff's rights to due process and equal protection under the United States Constitution.
7. Will the appeal turn on an interpretation or application of a particular case or statute? Yes. If so, cite case or statute number. United States Constitution, Fourteenth Amendment.

8. Is there any known case involving substantially the same issue now pending before either appellate court of this state? No. If so, identify _____.

CERTIFICATION

I/We hereby certify that a copy of the foregoing statement was executed and a copy served on:

John Hackley
P.O. Drawer 490
London, KY 40743-0490
(606) 878-7640

Fred White
P.O. Box 1094
London, KY 40741
(606) 878-9661

Clerk
Whitley Circuit Court
Whitley County Courthouse
Williamsburg, KY 40769

_____

(Signature) (Date)

Name: David E. Waite

Address: 620 Market Street,
Suite 301
Knoxville, TN 37902-2286
(615) 524-3013

The filing of a civil notice of appeal suspends the running of time for further steps in the appeal--see CR 76.14(13).

(2)

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MOSSIE JOHNSON, - - - - - Petitioner

versus

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER, and ROSE'S STORES, INC. - - - Respondents

---

Petition For A Writ Of Certiorari To The Court of Appeals Of Kentucky

---

BRIEF FOR RESPONDENT

TOMMIE L. WEATHERLY
WEATHERLY LAW OFFICES
P.O. Box 1094
London, Kentucky 40743-1094
Counsel of Record for the Respondent, Dennis Lynch, d/b/a Forrest Hills Shopping Center

June 3, 1993

WESTERFIELD-BONTE CO., 619 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

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13 pp

QUESTIONS PRESENTED

1. Does petitioner's alleged loss, even though negligently caused, amount to a "deprivation" in violation of the due process clause of the Fourteenth Amendment of the United States Constitution when, (a) the loss did not occur as a result of some established state procedure, but as a result of the unauthorized failure of the state's agents to follow established state procedures, (b) no contention is made that the procedure established by the state was inadequate, (c) no contention is made that it is practicable for the state to provide a predeprivation hearing, (d) the state itself provides a remedy to persons who believe they have suffered a tortious loss at the state's hands, and (e) the state remedies provide the petitioner with all the relief which may have been available if she were allowed to proceed with her civil cause of action?

2. Does the state's limitation of action scheme rationally advance a reasonable and identifiable governmental objective of timely disposing of personal injury claims?

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Miscellaneous:

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STATUTES INVOLVED

United States Constitution, Amendment XIV (14), Section One (1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Constitution, Section 103, Bonds of county officers and other officers:

> The Judges of County Courts, Clerks, Sheriffs, Surveyors, Coroners, Jailers, Constables, and such other officers as the General Assembly may, from time to time, require, shall before they enter upon the duties of their respective offices, and as often thereafter as may be deemed proper, give such bond and security as may be prescribed by law.

Ky. Rev. Stat. §30A.030 Bond of clerks, deputies and other personnel:

> (1) All clerks, deputy clerks, and other persons employed in the office of the clerk shall be bonded to the Commonwealth for the faithful performance of their duties and for the accounting of all funds which may come into their hands by virtue of their office. They shall be covered by the blanket bond for all elected or appointed state officials.
>
> (2) No other bond shall be required for performance of duty by the clerk, and any statute to the contrary is repealed to the extent of the conflict.

Ky. Rev. Stat. §30A.140 Additional duties of clerk:

> Every clerk shall perform such additional duties as may be prescribed by statute or court rule.

Ky. Rev. Stat. §413.140 Actions to be brought within one year:

> (1) The following actions shall be commenced within one (1) year after the cause of action accrued:
>
> (a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice or servant.

Ky. Rev. Stat. §413.250 When action commences:

> An action shall be deemed to commence on the date of the first summons or process issued in good faith from the court having jurisdiction of the cause of action.

Ky. R. Civ. P. Rule 3. Commencement of Action:

> A civil action is commenced by the filing of a complaint with the court and the issuance of a summons or warning order thereon in good faith.

Ky. R. Civ. P. Rule 4.01 Summons; Issuance; By Whom Served:

> Upon the filing of the complaint (or other initiating document) the clerk shall forthwith issue the required summons . . .

No. 92-1776

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MOSSIE JOHNSON, - - - - - - - - - *Petitioner,*

v.

DENNIS LYNCH, d/b/a FORREST HILLS SHOPPING CENTER, and
ROSES STORES, INC. - - - - - - - - *Respondents.*

Petition For A Writ Of Certiorari
To The Court of Appeals Of Kentucky

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner, Mossie Johnson, was injured on September 13, 1989 when she allegedly fell on a concrete barrier at the Rose's Department Store in Corbin, Kentucky. On September 10, 1990 she submitted her complaint in the underlying action to the Whitley County Circuit Court Clerk. Summonses on the complaint were not issued by the Whitley County Circuit Clerk until September 14, 1990, one day after the applicable statute of limitations had expired. Both respondents filed Motions to Dismiss on the

basis that the action was not timely initiated. The Whitley Circuit Court granted said motions on the grounds that the complaint was not timely filed within the applicable statute of limitations as set forth in Kentucky Revised Statutes §413.140 and Kentucky Revised Statutes §413.250. (hereinafter KRS).

Petitioner appealed to the Court of Appeals of the Commonwealth of Kentucky preserving the one issue before the court today; whether or not the trial court's Order of Dismissal violated petitioner's due process and equal protection rights under the Fourteenth Amendment. The Court of Appeals affirmed the trial court's dismissal holding that the petitioner's civil action was not timely commenced pursuant to Rule 3 of the Kentucky Rules of Civil Procedure, which provides that an action is commenced by the filing of a complaint *and* the issuance of a summons, and KRS 413.250, which provides that an action shall be deemed to commence on the date of the issuance of the first summons. Since the first summons was issued on the 14th day of September, 1990, the petitioner's action was held to be appropriately dismissed as time barred by the one-year statute of limitations provided in KRS 413.140.

Petitioner filed a Motion for Discretionary Review in the Supreme Court of Kentucky. An Order Denying Discretionary Review was entered on February 10, 1993 by the Supreme Court of Kentucky. Petitioner has petitioned this Court for a Writ of Certiorari and the respondent, David Lynch, d/b/a Forest Hills Shopping Center, now files his Brief in Opposition.

SUMMARY OF ARGUMENT

Admittedly, petitioner's cause of action is a species of a property protected by the Fourteenth Amendment's due process clause. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950). *See also*

Logan v. *Zimmerman Brush Co.*, 455 US 422, 71 L Ed 2d 265, 102 S Ct 1148 (1982). However, petitioner was accorded due process when her cause of action was terminated for her failure to comply with a reasonable procedural rule. The state, in this instance, provides an adequate post-deprivation remedy which is now available to the petitioner. Petitioner's cause of action now lies against the Whitley County Circuit Court Clerk for its failure to forthwith issue the required summons. This latter remedy would allow petitioner to recover money damages, the only damages available in petitioner's underlying litigation. As such, the petitioner fails to establish a Fourteenth Amendment violation.

The state has a legitimate governmental interest in requiring the timely disposition of personal injury claims. As conceded by the petitioner, the state, through its limitation period, achieves this result in a rational manner. The petitioner was charged with knowing the limitation requirements and it was her own lack of diligence in initiating her claim which differentiates her cause of action. The state's classificatory scheme rationally promotes the state's reasonable and identifiable governmental objective.

ARGUMENT

I. Petitioner was accorded due process when her cause of action was terminated for her failure to comply with a reasonable procedural rule.

This Court has held that states "may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan* v. *Zimmerman Brush Co.*, 455 US 422, 437, 71 L Ed 2d 265, 102 S Ct 1148 (1982) (citations omitted). The Kentucky Legislature has enacted a one-year statute of limita-

tions for filing a personal injury action. *See* KRS 413.140. Rule 3 of the Kentucky Rules of Civil Procedure provides that a civil action is commenced by the filing of a complaint *and* the issuance of a summons. Petitioner claims to have been injured on September 13, 1989. KRS 413.250 provides that an action shall be deemed to commence on the date of the issuance of the first summons. Pursuant to CR 3 and KRS 413.250, therefore, petitioner's action must be deemed to have been commenced on September 14, 1990, the date on which the first summons was issued and one day after the one-year statute of limitations had run.

KRS 30A.140 directs every circuit court clerk to perform "such additional duties as may be prescribed by statute or court rule." CR 4.01 prescribes that "upon the filing of the complaint, (or other initiating document) the clerk shall forthwith issue the required summons. . ." In this case, the clerk did not issue the summons until four days after the filing of the complaint. However, in Kentucky, a plaintiff is charged with knowing that a summons must be issued by the clerk. *Casey* v. *Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528 (1913). At a hearing on the motion to dismiss, no evidence was presented showing that petitioner's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that counsel verified with the clerk that the summons had actually been issued. It is well established by Kentucky case law that a failure to have a summons issued within the statute of limitations is fatal to a cause of action. *Casey* v. *Newport Rolling Mill Co.*, 156 Ky. 623, 161 S.W. 528; *Simpson* v. *Antrobus*, 260 Ky. 641, 86 S.W.2d 544 (1935); *Delong* v. *Delong*, Ky., 335 S.W.2d 895 (1960).

Petitioner continues to rely on this Court's decision in *Logan* as the basis of her appeal. The issue in *Logan* was whether a state may terminate a complainant's cause of action because a state official, for reasons beyond the

complainant's control, failed to comply with a statutorily-mandated procedure. Although the employee in *Logan* timely filed his complaint with the Illinois Fair Employment Practices Commission, the Commission failed to conduct a conference within the statutorily-mandated time period. The employer moved to dismiss the complainant's charge because the Commission had failed to hold a conference in a timely fashion. The Commission rejected this request.

On appeal, the Supreme Court of Illinois found the legislative language to be mandatory and, accordingly, held that the failure to comply with the statutorily-mandated period deprived the Commission of jurisdiction to consider the complaint. This Court reversed, holding that the appellant was deprived of a protected property interest in violation of the due process clause of the Fourteenth Amendment because the state's interest in refusing his procedural request was outweighed by his private interest and the length or finality of the deprivation.

In *Logan* the state system itself deprived the complainant of his property interest. Here, in contrast, the petitioner does not contend that the procedure established for initiating her cause of action was constitutionally inadequate, nor does she contend that the loss of her cause of action occurred as a result of the established state procedure. Petitioner's loss, if any, occurred as a result of a random and unauthorized failure of the state's agent, in this case the Whitley County Circuit Clerk, to follow established state procedures.

However, Johnson is not without a remedy for the clerk's action, or inaction, in the instant matter. Section 103 of the Kentucky Constitution requires that circuit court clerks post such bond as prescribed by law. KRS 30A.030 requires that all clerks shall be bonded for the faithful performance of their duties.

There is sufficient Kentucky case law to support the petitioner's cause of action against the Whitley County Circuit Court Clerk. Such clerks have been found liable for errors committed in their ministerial functions and also in damages for the negligent and careless acts of their deputies. *See Commonwealth, to Use of Green* v. *Johnson*, 123 Ky. 437, 96 S.W. 801 (1906); *Jeffers* v. *Taylor*, 178 Ky 392, 198 S.W. 1160 (1917).

While a post-deprivation remedy would have been inadequate in *Logan*, the post-deprivation remedies available to Johnson in the instant action are adequate, and accord petitioner all the process due her under the Fourteenth Amendment. *Parratt* v. *Taylor*, 451 US 527, 68 L Ed 2d 420, 101 S Ct 1908 (1981). As in *Parratt*, "[i]t is difficult to conceive of how the state could provide a meaningful hearing before the deprivation takes place." *Id.*, at 541, 68 L Ed 2d 420, 101 S Ct 1908. As such, petitioner fails to establish a Fourteenth Amendment violation. *Logan*, 455 US 422, 71 L Ed 265, 102 S Ct 1148.

II. The state's classificatory scheme rationally promotes the state's reasonable and identifiable governmental objective.

The petitioner concedes that the Commonwealth of Kentucky has a legitimate governmental interest in requiring the timely disposition of personal injury claims. Petitioner also concedes that the state, through its limitation period, achieves this result in a rational manner. Petitioner contends that the pertinent statutes and rules, acting together, and, as applied here, bar petitioner's cause of action when a clerk fails to issue a summons within the statute of limitation period. However, once again, the petitioner, through her own admission, was charged with knowing the limitation of actions requirements.

Petitioner's own lack of diligence in initiating her claim differentiates her cause of action from those who initiate

their claim with due diligence. This classification is rationally related to the state's interest of timely presentation of claims and is, in fact, the justification for the classification. Clearly, the classificatory scheme rationally promotes the state's reasonable and identifiable objective. *Schweiker* v. *Wilson*, 450 US 221, 235, 67 L Ed 2d 186, 101 S Ct 1074 (1981).

CONCLUSION

The petitioner has been afforded due process by the Commonwealth of Kentucky when it terminated petitioner's cause of action by a reasonable procedural rule. The state itself has provided petitioner with an adequate post-deprivation remedy which the petitioner is now free to pursue. This post-deprivation remedy would make petitioner as whole as a suit on the merits in the original action. Petitioner has also failed to prove an equal protection violation under the Fourteenth Amendment of the United States Constitution. Petitioner's classification was due to her own lack of diligence in initiating her claim. This classification is directly related to the state's interest in requiring litigants to timely initiate their action. For these various reasons, the Petition for Writ of Certiorari should be denied. Respondent requests that this petition be denied and that the appropriate Order be entered.

Respectfully submitted,

TOMMIE L. WEATHERLY
WEATHERLY LAW OFFICES
P.O. Box 1094
London, Kentucky 40743-1094
Telephone: (606) 878-9661
Counsel of Record for the Respondent, Dennis Lynch, d/b/a Forrest Hills Shopping Center

Supreme Court, U.S.
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No. 92-1776

In The

Supreme Court of the United States

October Term, 1992

MOSSIE JOHNSON,

Petitioner,

v.

DENNIS LYNCH D/B/A FORREST HILLS SHOPPING CENTER and ROSE'S STORES, INC.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeals For The Commonwealth Of Kentucky

BRIEF IN OPPOSITION

JOHN F. KELLEY
Attorney at Law
P. O. Box 490
London, KY 40743-0490
(606) 878-7640

Attorney for Respondent Rose's Stores, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

The Petitioner, Mossie Johnson, allegedly was injured on September 13, 1989, when she fell on a concrete barrier located on the premises of the Rose's Department Store in Corbin, Kentucky. The resulting lawsuit was filed on September 10, 1990, in the Whitley County Circuit Court. However, the action was not commenced within the applicable statute of limitations in that a summons was not issued until September 14, 1990; one day after the statute of limitations had expired.

Both Respondents then filed Motions to Dismiss raising the defense of statute of limitations. Both Motions were granted by the Judge of the Whitley Circuit Court. This judgment was upheld by the Court of Appeals of Kentucky and discretionary review was denied by the Supreme Court of Kentucky.

The issue raised by the Petitioner in the Court of Appeals and now in the United States Supreme Court is whether the trial court's dismissal of the action in any way violated the Petitioner's Fourteenth Amendment rights of due process or equal protection.

SUMMARY OF THE ARGUMENT

Petitioner, Mossie Johnson, has filed a Petition For a Writ of Certiorari to the Court of Appeals for the Commonwealth of Kentucky. Petitioner primarily relies on *Logan Brush Company v. Zimmerman*, 455 U. S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982) in support of her

allegation that her due process rights and equal protection rights were violated as a result of the failure of the Whitley Circuit Court Clerk to issue summons within the statute of limitations applicable to her personal injury action.

Logan, however, is distinguishable from her case in all aspects in that Petitioner's counsel had a duty to ensure that the action was commenced within the applicable statute of limitations, Petitioner is not without recourse if any act of negligence was performed by the Circuit Court Clerk, and Petitioner is not challenging that system itself but only a single act within that system. Also, with regard to the equal protection claim, Petitioner's claim is without merit because the applicable standard is rationally based.

Thus the Respondent, Rose's Stores, Inc., requests that the Petition for A Writ of Certiorari from the Court of Appeals for the Commonwealth of Kentucky be denied.

ARGUMENT

I

THE DECISION OF THE KENTUCKY COURT OF APPEALS IS CORRECT IN STATING THAT NONE OF PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED.

The Petitioner's underlying action arises out of an alleged personal injury which, in Kentucky, carries a one year statute of limitations. Pursuant to KRCP 3 and KRS 413.140 an action is commenced only when the complaint is filed *and* a summons is issued. It is well established in

Kentucky that failure to issue a summons within the applicable statute of limitations is fatal to the claim, *Delong v. Delong*, Ky., 335 S.W. 2d 895 (1960); *Simpson v. Antrobus*, Ky., 86 S.W. 2d 544 (1935). In the instant action, the summons was not issued until one day after the applicable statute of limitations had expired resulting in dismissal of the action.

The Petitioner has alleged that the clerk's failure to issue the summons "forthwith" upon the filing of her complaint pursuant to KRCP 4.01 is a violation of her Fourteenth Amendment due process rights due to the resulting dismissal of her action. She bases her argument on *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 71 L. Ed. 2d, 265, 102 S. Ct. 1148 (1982).

In *Logan*, a probationary employee was discharged from his duties and filed a timely complaint with the Illinois Fair Employment Practices Commission. The Commission then had an obligation under the state's Fair Employment Practices Act to hold a factfinding conference within 120 days. The conference was not scheduled until 5 days after the 120 days had expired resulting in Mr. Logan's claim being dismissed leaving him with no further recourse. This dismissal was overturned by the U. S. Supreme Court as violative of Mr. Logan's due process rights.

As pointed out by the Kentucky Court of Appeals, *Logan* is distinguishable from the instant case. The scheduling of the required hearing in *Logan* was beyond the appellant's control. However, in the instant case, appellant's counsel is charged with knowing that a summons must be issued in order to commence an action, and there

was no evidence adduced at the hearing on the Motion to Dismiss showing that appellant's counsel alerted the clerk that the summons needed to be issued no later than September 13, 1990, or that counsel checked with the clerk to ensure that a summons had been issued.

The instant case is further distinguishable to *Logan* with regard to the finality of the deprivation. Unlike the Petitioner here, Mr. Logan had no other means of recourse available to him upon dismissal of the action. This distinguishing factor is explained by the court in *Parratt v. Taylor*, 451 U. S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981). In *Parratt*, an inmate in a Nebraska prison was deprived of personal property through the negligence of prisoner employees. The stated question was whether an allegation of simple negligence is sufficient to give rise to a claim of violation of due process. The Court stated "in particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the requirements of procedural due process." *Id.* at 537. The Court decided that because Nebraska had in place sufficient remedies for losses such as those suffered by the Petitioner that a Fourteenth Amendment violation had not occurred. The Court further stated,

> To accept Respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. *Id.* at 544.

The reasoning in *Parratt* is much more in line with the underlying case in that Kentucky does provide adequate remedy for any deprivation suffered by the Plaintiff. Section 103 of the Kentucky Constitution requires that clerks give a bond and KRS 38.030 requires that all clerks be bonded for the faithful performance of their duties.

Furthermore, in the case of *Commonwealth, to use of Green v. Johnson*, 123 Ky. 437, 96 S.W. 801, 802 (1906), the highest court in Kentucky held that clerks are liable for errors committed in their ministerial functions unless they can show that the errors occurred in spite of use of reasonable care and diligence. Therefore the laws of Kentucky do supply a remedy for Plaintiff's alleged deprivation.

Finally, these two cases were distinguished in *Logan* itself with the Court stating:

> unlike the complaint in *Parratt*, *Logan* is challenging not the commission's error, but the "established state procedure" that destroys his entitlement without affording him proper procedural safeguards. *Logan* at 436.

As in *Parratt*, the petitioner here is challenging an isolated act by a state employee and not the procedure involved itself.

For the above reasons, the Petitioner has failed to establish a violation of her due process rights and the Petition for a Writ of Certiorari should be denied.

II

PETITIONER's FOURTEENTH AMENDMENT EQUAL PROTECTION RIGHTS HAVE NOT BEEN VIOLATED.

To support her argument of the violation of the equal protection clause, Plaintiff also relies on *Logan* supra. Although the court in Logan did not decide the issue of whether an equal protection violation had occurred, Justice Blackmun in his separate opinion seemed to believe that a violation had occurred because two disparate classes were created by the procedure in question without a rational basis.

Although it may be that the Kentucky statute creates two classes; those individuals whose summons were issued within the statute of limitations and those who were not, the situation once again is distinguishable from that in *Logan*.

The Illinois statute divided claimants into two groups which were accorded different treatment. Those claims processed within 120 days were given full consideration on the merits. Those that did not receive a hearing within the time period were finally terminated. As the Court stated in *Logan*,

> For over a century the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the equal protection clause guarantees. At the minimum level, however, the Court "consistently has required that legislation classify the person it affects in a manner rationally related to legitimate governmental objectives". This is not a

> difficult standard for a state to meet when it is attempting to act sensibly in good faith. But the 'rational basis standard is not a toothless one'. *Id.* at 439. Citations omitted.

According to the opinion of Justice Blackmun, creation of the two classes in the Illinois statute in question did not meet the rational basis test. This was because the two purposes behind the standard of eliminating employment discrimination and protecting employers and other potential defendants from unfounded charges of discrimination were not furthered by the 120 day deadline provision. *Id.* at 439.

However, the underlying purpose for specifying a statute of limitations for particular cause of actions certainly is advanced by establishing the unequivocal deadline for commencing an action within that statute of limitations. This purpose is advanced by Kentucky's rule requiring that the complaint be filed and summons issued within the applicable statute of limitations. Furthermore, the petitioner is not challenging the system itself, but is challenging an isolated act involving that system.

Therefore the Petitioner's allegations of a violation of equal protection are without merit and the Petition for a Writ of Certiorari on these grounds should be denied.

CONCLUSION

As has been established, Petitioner's claim that her due process rights and equal protection rights were violated by the dismissal of her action as being time barred by the applicable statute of limitations is without merit. The primary case on which Plaintiff bases her claim is in every way distinguishable from her own claim. Accordingly, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

JOHN F. KELLEY
Attorney at Law
P. O. Box 490
London, Kentucky 40743-0490
(606) 878-7640

Attorney for Respondent,
Rose's Stores, Inc.